In the Supreme Court

OF THE

United States

Supreme Court, U. S.
FILED
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CHARLES ELMORE CROPLEY
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OCTOBER TERM, 1943

Nos. 764 and 765

ALFRED FENTON,
Petitioner,

vs.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,
Respondent.

RUSSELL G. SMITH,
Petitioner,

vs.

L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,
Respondent.

PETITION FOR REHEARING ON PETITION FOR CERTIORARI.

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Subject Index

Page

Petition for rehearing on petition for certiorari..... 1

I.

Where the record on appeal affirmatively established lack of jurisdiction, the Circuit Court found jurisdiction by resort to material contained in briefs..... 2

II.

Individuals were sentenced to jail where the record fails to show elements essential to their conviction..... 5

Table of Authorities Cited

Pages

Cheney v. Richards (1931), 130 Me. 288, 155 A. 642, 644.. 5n

Chisholm-Ryder Co. v. Buck (1933), 65 Fed. (2d) 735.... 4

Continental Ins. Co. v. Rhoads, 119 U. S. 237, 239, 7 S. Ct. 193, 30 L. Ed. 380..... 5

Ex parte Smith (1877), 94 U. S. 455, 24 L. Ed. 165..... 5

Fishback v. Western U. Tel. Co., 161 U. S. 96, 100, 16 S. Ct. 506, 40 L. Ed. 630 5

Grace v. American Central Ins. Co., 109 U. S. 278, 283, 3 S. Ct. 207, 27 L. Ed. 932..... 5

Hayes v. Fischer, 102 U. S. 121..... 5n

Highway Const. Co. v. McClelland, 14 F. (2d) 406..... 5

Morris v. District of Columbia (1941), 124 Fed. (2d) 284 4

Pilger v. Sutherland (1932), 57 Fed. (2d) 604..... 4

Robertson v. State (1925), 20 Ala. App. 514, 104 So. 561 564 ..... 5n

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PETITION FOR REHEARING ON PETITION FOR CERTIORARI.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners Alfred Fenton and Russell G. Smith, respectfully petition this Court to reconsider its decision on the petitions for writs of certiorari filed by petitioners in this Court on March 6, 1944, and denied on April 10, 1944.[1] Rehearing is requested because the Circuit Court of Appeals made a substantial departure from the accepted and usual course of judicial proceedings in the following material instances:

1. Where the record on appeal affirmatively established lack of jurisdiction, the Circuit Court found jurisdiction by resort to material contained in briefs.

2. Individuals were sentenced to jail where the record fails to show elements essential to their conviction.

I.

WHERE THE RECORD ON APPEAL AFFIRMATIVELY ESTABLISHED LACK OF JURISDICTION, THE CIRCUIT COURT FOUND JURISDICTION BY RESORT TO MATERIAL CONTAINED IN BRIEFS.

The District Court in a separate proceeding found petitioners guilty of contempt as a result of their failing to obey certain orders issued by said Court in a proceeding under the Fair Labor Standards Act

[1]Because the legal grounds for the petitions for certiorari in both cases are basically the same, the petitions of petitioners for a rehearing are combined.

of 1938. The only evidence in the record pertaining to the jurisdiction of the District Court is found in the affidavits of petitioners which allege that no employees are engaged in interstate commerce (R.F. 47; R.S. 23); thus the record affirmatively established lack of jurisdiction. The Circuit Court of Appeals in sustaining petitioners' conviction for contempt stated that "the Court's jurisdiction was to be determined * * * by reference to the complaint" in the original action. (R.F. 204; R.S. 187.) However, prior to this the Circuit Court had said:

> "The records on appeal do not contain the complaint or the Bank's answer, and what is said here in respect of the condition of the pleadings is obtained from the briefs." (R.F. 199; R.S. 182.)

Even counsel for respondent admitted the error of the Court in this regard. In footnote 12 on page 14 of the brief of respondent in opposition, the following appears:

> "The Circuit Court of Appeals, in a footnote to its opinion (R.F. 199; R.S. 182), said that, since the complaint and answer in the main action were not in the record, its statements regarding the condition of the pleadings were obtained from the briefs. The court apparently overlooked the fact that the necessary information appears in other pleadings and admissions in the record."

Respondent fails to amplify his point of view or to minimize or justify the error of the Circuit Court, which appears to be admitted. Respondent shows nothing in extenuation of the harm which must result from permitting the decision to remain in the books.

Certiorari is required because if not granted the decision of the Circuit Court of Appeals remains as authority for the proposition that the Court may support jurisdiction by freely considering matters not found in the record on appeal and may even resort to the briefs filed by the parties. This is contrary to the well established and salutary rule that on appeal the record on appeal furnishes the basis for review. (*Pilger v. Sutherland* (1932), 57 Fed. (2d) 604; *Chisholm-Ryder Co. v. Buck* (1933), 65 Fed. (2d) 735; *Morris v. District of Columbia* (1941), 124 Fed. (2d) 284.)

To emphasize the error of the Circuit Court of Appeals in this regard it should be sufficient to ask upon which brief shall the Court rely to supply essential elements which are lacking, the brief of petitioner or the brief of respondent? Is the Court free to rely on one brief and to exclude the other? Certiorari is essential in order to correct this most serious departure by the Circuit Court of Appeals from the accepted and usual course of judicial proceedings and to prevent the establishment of a rule which can lead only to disastrous confusion as to the extent and nature of judicial review. Judicial determination under our system of jurisprudence must be based upon *proof* not upon partisan representations contained in briefs. To do otherwise is to completely disregard the fundamentals of judicial procedure and to substitute pure assumption for fact.

II.

INDIVIDUALS WERE SENTENCED TO JAIL WHERE THE RECORD FAILS TO SHOW ELEMENTS ESSENTIAL TO THEIR CONVICTION.

In this connection it should be sufficient to point out that petitioners were found, in a separate proceeding,[2] to be in contempt of Court. In the record as to this separate proceeding there was nothing to establish the jurisdiction of the Court. This is an essential requirement in federal cases. (*Ex parte Smith* (1877), 94 U. S. 455, 24 L. Ed. 165; *Fishback v. Western U. Tel. Co.*, 161 U. S. 96, 100, 16 S. Ct. 506, 40 L. Ed. 630; *Grace v. American Central Ins. Co.*, 109 U. S. 278, 283, 3 S. Ct. 207, 27 L. Ed. 932; *Continental Ins. Co. v. Rhoads*, 119 U. S. 237, 239, 7 S. Ct. 193, 30 L. Ed. 380; *Highway Const. Co. v. McClelland*, 14 F. (2d) 406.) The present case is even stronger than one where the record is merely silent. The record set forth positive allegations made under oath by petitioners, which totally destroyed the jurisdiction of the Court. (R.F. 47; R.S. 23.) The record contains nothing in contradiction and also fails to show that any consideration was given to this affirmative defense by the District Court.

Petitioners therefore stand convicted in a case where in the District Court the record (1) fails to establish jurisdiction; (2) contains positive allegations under oath of facts which destroy jurisdiction; (3) fails to show any consideration of a proper matter of defense.

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[2]That contempt proceedings are separate and independent, see *Hayes v. Fischer*, 102 U. S. 121; *Robertson v. State* (1925), 20 Ala. App. 514, 104 So. 561, 564; *Cheney v. Richards* (1931), 130 Me. 288, 155 A. 642, 644.

In the face of the foregoing the Circuit Court affirmed the conviction. The situation is the same as if the Circuit Court had said the record fails to show the essential elements to conviction but on the assumption that Courts generally act properly, the conviction will be affirmed. If this be the rule there can never be any purpose in a record on appeal, and the right of appellate review becomes meaningless.

Certiorari must be granted because the Circuit Court of Appeals has affirmed a judgment where the judgment in material and essential elements thereof is not supported by proof as shown by the record on appeal.

Dated, San Francisco, California,
April 28, 1944.

Respectfully submitted,
LOUIS FERRARI,
G. D. SCHILLING,
PHILIP S. EHRLICH,
Attorneys for Petitioners.

KENNETH M. JOHNSON,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am one of the petitioners' counsel in the above entitled cause and that, in my judgment, the foregoing petition is well founded in law and in fact, and that said petition is not interposed for delay.

Dated, San Francisco, California,
April 28, 1944.

LOUIS FERRARI,
Attorney for Petitioners.

Due service and receipt of a copy of the within is hereby admitted

this.....*day of April, 1944.*

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Acting Solicitor United States Department of Labor,
Wage and Hour Division.

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Acting Solicitor United States Department of Labor,
Wage and Hour Division,
Attorneys for Respondent.